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Before The
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Communications Assistance for)
Law Enforcement Act)

CC Docket No. 97-213

To: The Commission

REPLY COMMENTS OF THE CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION

Michael Altschul
Vice President and General Counsel

Randall S. Coleman
Vice President
Regulatory Policy & Law

Cellular Telecommunications
Industry Association
1250 Connecticut Ave., N.W.
Suite 200
Washington, D.C. 20036
(202) 785-0081

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SUMMARY

The Cellular Telecommunications Industry Association ("CTIA") submits these Reply Comments regarding the need for an extension of the Communications Assistance for Law Enforcement Act ("CALEA") compliance date as requested in the Federal Communications Commission ("Commission") Public Notice dated April 20, 1998. CTIA continues to support an immediate, industry-wide extension of the October 25, 1998, CALEA compliance date. CTIA urges the Commission to reject the arguments of the Federal Bureau of Investigation ("FBI") and the Department of Justice ("DOJ") against a blanket extension and in favor of private, so-called "forbearance" agreements as a substitute.

The Commission has the clear statutory power to grant a complete extension under CALEA. The record before the Commission supports a blanket extension, such an extension makes sense given that CALEA-compliant technology is not available today, and will not be available for two years after the Commission acts on the pending petitions.

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¹ See DOJ/FBI Comments Regarding the Commission's Authority to Extend the October 25, 1998 Compliance Date, CC Docket No. 97-213, filed May 8, 1998 ("DOJ Extension Comments").

They would prefer negotiating private, so-called "forbearance" agreements -- a process industry uniformly has rejected -- or putting the Commission and industry to the task of submitting individual petitions under Section 107(c), which inevitably must be granted because there is no CALEA-compliant technology available today. In the end, the Commission should reject DOJ's arguments against a blanket extension because the Commission has a record before it to support the extension and the power to grant it under CALEA.

Finally, the Commission should consider the DOJ comments in the context of these proceedings. It was but one pleading cycle ago that DOJ warned the Commission to reject industry's purported view that "the mere existence of the published J-STD-025 interim standard satisfies the safe harbor requirements of section 107(a)."² Now, for the convenience of creating a lawyer's argument to deny industry an extension, DOJ would sacrifice its credibility and acknowledge that the industry standard, after all, is and will remain a safe harbor unless and until the Commission changes it by rule.³ But the DOJ comments prove too much and are too clever by half -- the industry standard is indeed a safe harbor, and the industry is

²Reply Comments of the Federal Bureau of Investigation Regarding the Implementation of the Communications Assistance for Law Enforcement Act, CC Docket No. 97-213, filed February 11, 1998, at 4-5 (emphasis in original).

³DOJ Extension Comments, ¶¶ 6, 26.

also entitled to an extension of the compliance date to meet it.

I. A BLANKET EXTENSION UNDER CALEA IS BOTH AUTHORIZED AND APPROPRIATE

There are at least three grounds upon which the Commission can act to grant an extension. First, Section 107(b)(5), in plain words, grants the Commission express authority to adjust the CALEA compliance date to permit carriers to transition to any standard declared by the Commission.⁴

Second, Section 107(c) allows the Commission to grant carriers up to a two-year extension when compliance with Section 103 is not reasonably achievable through available technology.⁵ There is no dispute that compliant technology is not now available and will not be available for at least two years after the Commission acts.⁶ Even DOJ admits that fully compliant technology is not on the immediate horizon.⁷ DOJ cannot name a single carrier or manufacturer that has compliant technology available today. Faced with this

⁴ 47 U.S.C. § 1006(b)(5).

⁵ 47 U.S.C. § 1006(c).

⁶ See Comments of the Telecommunications Industry Association ("TIA"), CC Docket No. 97-213, DA 98-762, filed May 8, 1998, at 9-10. TIA, of course, is the industry association that represents the interests of manufacturers of telecommunications equipment.

⁷ *Communications Assistance for Law Enforcement Act (CALEA) Implementation Report*, Federal Bureau of Investigation of the Department of Justice, January 26, 1998, at 18.

reality, the Commission need not put either carriers or itself to the task of processing hundreds of petitions for extension that recite the same absence of compliant technology as the basis. An omnibus extension is warranted today.

Finally, the Commission has authority under Section 301 of CALEA to fashion rules to implement CALEA.⁸ DOJ's attempt to torture the statutory meaning and argue that granting a delay to allow for cost-efficient implementation of a standardized solution is not "implementation" is just plain wrong. The Commission's duty is enumerated in CALEA - when a person petitions the Commission to act on an industry standard, it must ensure a cost-efficient implementation, protect privacy and allow industry sufficient time to meet the new requirements. Nothing could be more plain.

**A. SECTION 107(b)(5) PERMITS AN INDUSTRY-WIDE
EXTENSION FOR COMPLIANCE**

Section 107(b) allows the Commission to establish, by rule, technical requirements or standards to implement Section 103, upon petition of any agency or persons, in two specific cases: (1) if industry associations or standard-setting organizations fail to issue such standards or (2) if any person believes a published standard is deficient. In either case, under Section 107(b)(5), the Commission must "provide a reasonable time and conditions for compliance with

⁸ 47 U.S.C. § 229(a).

and the transition to any new standard, including defining the obligations of telecommunications carriers under section 103 during any transition period."

Strangely, DOJ argues that the Commission's authority under Section 107(b) actually is circumscribed and "exists only in the context of the transition from industry standards found to be deficient to different, Commission-set standards defining the parameters of the optional safe harbor method of compliance with § 103."⁹ To support this reading, DOJ also claims that Section 107(b)(5) only applies to those carriers that are in an actual state of compliance with an industry standard at the time a Section 107(b) petition is filed. The plain words of the statute belie the DOJ's position.

First, DOJ simply ignores the case of a petition filed to establish a standard when industry has not acted to do so itself. Apparently, DOJ believes Section 107(b)(5) is inapplicable in that case.¹⁰ Obviously, the petitioning

⁹ DOJ Extension Comments, ¶ 22; see also ¶ 20 ([Section 107(b)(5) only provides that] "if an industry organization has issued safe harbor standards, those carriers that have chosen to achieve § 103 compliance in accordance with those standards, and that wish to continue complying with § 103 by remaining within a safe harbor, would be governed by transition-period provisions to be incorporated into the Commission's final rule.").

¹⁰ Of course, this was exactly the case raised by the CTIA Petition for Rulemaking filed in July 1997, which DOJ has now moved to dismiss. As noted in the CTIA Petition, the industry standard-setting process was at an impasse due to the FBI's continued promotion of its own CALEA standard, the Electronic Surveillance Interface ("ESI") document and insistence that the industry's standard include all of the capabilities in the ESI, even though

industry group would not be in compliance with any standard at the time or with Section 103.¹¹ Under DOJ's version of CALEA, those industry members seeking to comply with Section 103 through an industry standard would not be entitled to a reasonable time for transition to the new standard. Rather, according to DOJ's statutory scheme, they would either be subject to enforcement actions or would have to negotiate a forbearance agreement with the Attorney General (and every state prosecutor since the Attorney General has no authority to forbear for the several States).¹² There is no support for DOJ's view in CALEA, its legislative history or the record of testimony before Congress.

Second, the concept that a carrier must first be in compliance with an industry standard before being entitled to an extension to transition to the standard ultimately declared by the Commission is a novel argument created to support a desired outcome; that is, DOJ seeks to have the Commission

such capabilities went beyond CALEA's requirements. While five months later industry promulgated a standard over FBI objections, no industry standard existed at the time the CTIA Petition was filed. It would be strange indeed if DOJ could lobby the Commission to "sit on" on the CTIA Petition and then move to dismiss it so that the wireless industry would be denied an extension altogether.

¹¹ DOJ admits that Section 107(b) does not "set any deadline for the submission of [a Section 107(b)] petition." DOJ Extension Comments, ¶ 19. Thus, an industry group desiring a standard could petition the Commission on the eve of the compliance date or any time thereafter, but would not be entitled to an extension to comply with the ultimate standard according to DOJ.

¹² DOJ Extension Comments, ¶ 31, n.3.

require carriers to implement J-STD-025 now and then be obligated by rule to *transition* to any new standard later, regardless of the cost.¹³ CTIA, in its comments, strongly opposed and continues to oppose any bifurcated development of a CALEA standard, at least without a full accounting of the costs and potential impacts on subscriber rates and privacy protection.¹⁴

DOJ argues, however, that being compliant with J-STD-025 now is the only way for a carrier to have safe harbor under CALEA and to get the benefit of any "transition period" extension once the Commission declares the final rule. DOJ states that Section 107(b)(5) only applies to "any carrier that has chosen to comply with § 103 by means of the industry's safe harbor, and that seeks to continue to comply

¹³ See Joint Petition for Expedited Rulemaking by the Department of Justice and the Federal Bureau of Investigation, filed March 27, 1998 ("DOJ Petition") at 4.

¹⁴ See Response to Petition for Rulemaking by CTIA, the Personal Communications Industry Association ("PCIA") and the United States Telephone Association ("USTA"), filed April 9, 1998 ("Joint Industry Response") at 11. CTIA also rejects DOJ's blithe suggestion that manufacturers should simply build in the location tracking and data switching capabilities before the Commission makes a determination on CDT's Petition and then simply turn them off if the Commission rules they are not required. Who does DOJ think pays for the development costs of such features and how is such an approach consistent with Section 107(b)(5)'s mandate to implement CALEA in a cost-efficient manner? If the Commission decides to bifurcate compliance, it should declare all costs associated with any additional development to be borne by the government or otherwise "not reasonably achievable" so that the government, not industry, bears the burden associated with this approach.

by means of a safe harbor after the Commission has issued its supervening rule."¹⁵

DOJ offers no explanation concerning how a carrier can meet J-STD-025 to enjoy CALEA's safe harbor protection by the compliance date and therefore avoid civil enforcement actions. Nor does DOJ explain how carriers should manifest their intent to continue to enjoy safe harbor under the Commission's so-called "supervening standard." Would DOJ read into CALEA an additional requirement whereby any carrier that desires to continue to enjoy safe harbor under a supervening standard must petition the Commission for transition period coverage?

¹⁵ DOJ Extension Comments, ¶ 22. DOJ now is willing to admit that J-STD-025 is a safe harbor standard (See DOJ Extension Comments, ¶¶ 6, 26) to achieve its grander purpose, even at the risk of contradicting its prior statements to the Commission in this proceeding where DOJ stated:

Finally, Law Enforcement would be remiss if it failed to note some imprecise assertions made by United States Telephone Association (USTA) and CTIA suggesting that the mere existence of the published J-STD-025 interim standard satisfies the safe harbor requirements of section 107(a). In fact, . . . safe harbor under section 107(a) can only potentially exist where the carrier or manufacturer is *in compliance with* publicly available technical requirements or standards . . . that meet the requirements of section 103. Since carriers and trade associations assert in their NPRM comments that the technical solutions (software, equipment, etc.) to meet section 103 requirements are yet to be completed and deployed, it is clear that the statutory requirements for safe harbor have not been met.

Reply Comments of the Federal Bureau of Investigation Regarding the Implementation of the Communications Assistance for Law Enforcement Act, CC Docket No. 97-213, filed February 11, 1998, at 4-5.

Or, is the transition extension applicable to industry as a whole; that is, a blanket extension?

As the above discussion reveals, the Commission's authority under Section 107(b)(5) obviously is not limited to some hypothetical transition period between old and new standards,¹⁶ but rather goes to granting "telecommunications carriers" -- as in the *industry* -- a reasonable time to comply with any new or revised standard. There is no evidence that Congress intended there to be gaps in safe harbor coverage or for the Commission's authority to be limited to some transition period. After all, on closer reading of Section 107(b)(5), it is clear that the Commission has two separate grants of authority. One grant does in fact authorize the Commission to provide a reasonable time and conditions for transition to any new standard. The second grant, which DOJ utterly ignores, is the power to provide a reasonable time and conditions *for compliance with* any new standard. The compliance period, not the transition period, is the Commission's enabling clause to grant an industry-wide extension of the *compliance* date for telecommunications carriers.

¹⁶ The transition period from old to new standards is entirely hypothetical and presumptuous because the Commission may well validate J-STD-025 as an appropriate implementation of CALEA. Then there is no transition period and carriers still will not be in compliance with the industry standard. Thus, DOJ offers carriers and the Commission no solution other than forbearance agreements to the compliance deadline problem.

**B. SECTION 107(c) SUPPORTS A BLANKET EXTENSION
BECAUSE THE RECORD IS CLEAR THAT CALEA-
COMPLIANT TECHNOLOGY IS NOT AVAILABLE IN THE
INDUSTRY TODAY**

Extensions under Section 107(c)(2) are authorized when compliance is not reasonably achievable through application of technology available in the compliance period.¹⁷ The record now is overwhelming that CALEA-compliant technology is not now available for any carrier from any manufacturer of telecommunications equipment. DOJ itself has admitted as much in its report to Congress.¹⁸ Because individual carriers each would be entitled to an extension under Section 107(c), in its initial comments, CTIA noted that there is no reason for the

¹⁷ 47 U.S.C. § 1006(c)(2).

¹⁸ *Communications Assistance for Law Enforcement Act (CALEA) Implementation Report*, Federal Bureau of Investigation of the Department of Justice, January 26, 1998, at 18. Interestingly, the FBI contended in its report that Bell Emergis would have a compliant network-based solution available by the compliance date. Ameritech, in its extension petition, disclosed that it had advised the FBI in writing that the Bell Emergis solution was not feasible. Petition for Extension of time by Ameritech, filed April 24, 1998 ("Ameritech Petition") at 6. Now, Bell Emergis submits comments in this proceeding that make clear no network-based solution is feasible without switch alterations. Comments of Bell Emergis - Intelligent Signaling Technologies, filed May 8, 1998, at 3. In any event, whether or not some third party vendor offers a commercial solution to CALEA is irrelevant to any extension because Section 106 applies to a carrier and the manufacturers of its equipment. 47 U.S.C. § 1005. CALEA does not require carriers to adopt technology from other than its vendors.

Commission to refrain from granting an extension that would apply in the aggregate to all carriers.¹⁹

Despite its own representation to Congress, presumably based on its own investigation, DOJ now suggests that carriers have not met their burden in demonstrating the true state of their compliance capabilities. This claim is worth quoting in full for the Commission:

Petitioners, who have direct access to the information necessary to determine whether compliance with § 103 by October 25, 1998, is achievable, have presented the Commission with no evidence showing that it is not, relying instead upon bare assertions that industry participants are unable to achieve compliance by that date. Such bare assertions cannot definitively establish that there is a crisis in the industry regarding compliance (and in any event, any such crisis would have to be

¹⁹ CTIA notes that the grounds for extension under Section 107(c) are included in the grounds for issuance of an enforcement order by a court. Section 108(a)(2) provides that an order may only issue if a court finds "compliance with the requirements of this title is reasonably achievable through the application of available technology to the equipment, facility, or service at issue or would have been reasonably achievable if timely action had been taken." 47 U.S.C. § 1007(a)(2) (emphasis added). The difference, of course, is the additional requirement for a court to find that the technology is not available because of carrier or manufacturer bad faith. Congress correctly understood that compliance would not be reasonably achievable without technology being developed and becoming commercially available. H. Rep. No. 103-837, at 19, reprinted in 1994 U.S.C.C.A.N. 3489, 3506 ("These responsibilities of the manufacturers and support services providers make clear that they have a critical role in ensuring that lawful interceptions are not thwarted. Without their assistance, telecommunications carriers likely could not comply with the capability requirements.") The key point is that the focus of Section 107(c) extension requests is whether there is available technology, not whether there would or could have been if a different course had been taken.

addressed by Congress through amendment of CALEA, rather than by the Commission).²⁰

One can only conclude that DOJ has not reviewed, or has chosen to ignore, the various extension requests that have been filed with the Commission to date. Beginning with the extension petition of AT&T Wireless Services, Inc., filed jointly with Lucent Technologies, Inc., and Ericsson Inc., the manufacturers of its telecommunications equipment, and continuing to the most recent filings in these proceedings, each petition has been supported by manufacturer statements on the record that CALEA-compliant technology is not currently available for their carrier-customers, and will not be available for at least two years after the Commission declares the final assistance capability requirements.

Not only is CALEA-compliant technology not available to *deliver* intercepted communications, but the FBI currently is incapable of *receiving* it. No procurement contracts have been let by the FBI for the purchase of CALEA-enabled collection equipment. CTIA is informed that it will take 18 months or more for such equipment to be available. Thus, the FBI does not even have the capability of running a test bed for any carrier that would be prepared to deliver CALEA information. As it did in CC Docket No. 94-102 for Wireless E9-1-1 capabilities, the Commission not only should grant an adequate

²⁰ DOJ Extension Comments, ¶ 29 (emphasis added).

period of time to comply with industry standards, but it also should make compliance contingent on law enforcement demonstrating its ability to receive CALEA information.²¹

**C. SECTION 301 GRANTS THE COMMISSION AUTHORITY TO
PROMULGATE RULES FOR THE EFFICIENT
IMPLEMENTATION OF CALEA**

Finally, the Commission has authority under Section 301 of CALEA to establish the necessary procedures for processing extension requests.²² As CTIA noted in its comments, the Commission has granted blanket extensions in similar circumstances where carriers and manufacturers alike were similarly situated.²³ Such an extension, which allows carriers to implement CALEA uniformly and efficiently, is warranted and best serves the interests of the industry and the Commission.

²¹ See Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 94-104; FCC 96-264, adopted June 12, 1996, released July 26, 1996, 61 Fed. Reg. 40348, 40349 (August 2, 1996).

²² 47 U.S.C. § 229(a).

²³ CTIA Extension Comments at 14, n. 21 (citing *In the Matter of Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(b)(v) of the Communications Act of 1934*, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 97-303, released August 25, 1997; see also Comments of AirTouch Communications Inc., Regarding the CALEA Compliance Date, CC Docket No. 97-213, filed May 8, 1998 (citing *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Memorandum Opinion and Order, DA 98-481, at ¶ 47 (March 9, 1998) and *Ameritech Operating Companies*, 6 FCC Rcd 1541, 1542 ¶ 18 (1991)).

As to the DOJ comment that the Commission's authority does not extend to *delaying* CALEA's compliance date, only to *implementing* it, Congress has granted the Commission the express authority to process standards petitions under Section 107(b); Section 107(c) extension requests and reasonable achievability petitions under Section 109. In each case, the Commission's rules would be directed toward a delayed implementation of Section 103, either because the standard is deficient and carriers need time to comply with the new standard, or technology is not available that meets CALEA's requirements, or the cost of compliance is too high. The Commission itself has assumed it has such authority, and CTIA notes that DOJ did not challenge that assumption in the CALEA NPRM comments.²⁴

II. FORBEARANCE AGREEMENTS ARE NOT A SUBSTITUTE FOR AN EXTENSION

DOJ argues that an extension is not required because the Attorney General has announced her willingness to enter into forbearance agreements on her terms.²⁵ To date, the proposed terms of these agreements have not been acceptable to anyone in industry, which is why the FBI has yet to produce a single, signed agreement.

²⁴ See *Communications Assistance for Law Enforcement*, Notice of Proposed Rulemaking, CC Docket No. 97-213, FCC 97-356, released October 10, 1997.

²⁵ DOJ Extension Comments, ¶ 31.

It is not just a little ironic that DOJ believes it can unilaterally extend the compliance date of CALEA through these so-called forbearance agreements while it claims the Commission has no such authority. Further, one of the main conditions of a forbearance agreement is the requirement that the carrier and its manufacturers fully develop the punch list.²⁶ DOJ would use the promise of an extension to extract punch list concessions thereby transferring the Section 107 process from the FCC, as Congress intended, to the FBI. The Commission should not be party to this subversion of CALEA by denying a blanket extension or putting the terms and conditions of an extension in DOJ's hands.

The Commission should also recognize that these agreements are not to be negotiated in public. Congress stated unequivocally that CALEA implementation was to be an open process, particularly in regard to Section 107

²⁶ Letter from Stephen R. Colgate, Assistant Attorney General for Administration, to Thomas Wheeler, President, CTIA (Feb. 3, 1998). One might also ask why forbearance is needed if carriers are working to implement the industry safe harbor, which DOJ now apparently recognizes. There can be no enforcement action under Section 108 unless a court finds "compliance with the requirements of this title is reasonably achievable through the application of available technology to the equipment, facility, or service at issue or would have been reasonably achievable if timely action had been taken." 47 U.S.C. § 1007(a)(2). As the Commission knows, technology is not currently available. CTIA can only assume that DOJ believes it would have been if timely action had been taken. The delay in making technology available is attributable to the government, not industry. But by its forbearance argument, DOJ makes it clear that it will put recalcitrant carriers to the task of proving otherwise in court.

proceedings.²⁷ The Commission should conduct a full inquiry and disclose on the record, as CALEA requires, if different compliance standards are to be agreed to by the FBI in its private negotiations. In no event are such agreements a substitute for an extension.

²⁷ H. Rep. No. 103-837, at 19, *reprinted* in 1994 U.S.C.C.A.N. 3489, 3507 ("[Section 107(b)] is also intended to add openness and accountability to the process of finding solutions to intercept problems. Any FCC decision on a standard for compliance with this bill must be made publicly.")

III. CONCLUSION

For all of the reasons set forth above, the Commission should act now to toll CALEA compliance pending resolution of the capability dispute and then extend the compliance date for at least two years to permit carriers and manufacturers to reasonably meet the new requirements.

Respectfully submitted,



Michael Altschul
Vice President and General Counsel

Randall S. Coleman
Vice President
Regulatory Policy & Law

**Cellular Telecommunications
Industry Association**
1250 Connecticut Ave., N.W.
Suite 200
Washington, D.C. 20036
(202) 785-0081

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